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CRIMINAL LAW ISSUES

STATE v. HAMMOND, No. 41S04-0104-PC-196, ___ N.E.2d ___ (Ind. Jan. 28, 2002).
SHEPARD, C. J.

In Stewart [v. State, 721 N.E.2d 876 (Ind. 1999)], the perpetrator was convicted for driving while his license was suspended as an HTV. Id. at 877. At trial, Stewart argued unsuccessfully that the State failed to prove that it mailed him a notice containing the required advisement of his rights. Id. at 877-78. On appeal, we affirmed the conviction, noting: "To obtain convictions for driving while suspended or after being adjudicated an habitual violator, the State need prove . . . (1) the act of driving, and (2) a license suspension or an HTV adjudication, *plus* . . . (3) that the defendant knew or should have known [of the suspension]." Id. at 879 (emphasis in original).

We said, "[T]he essence of the HTV offense was the act of driving after being so determined. The focus is not on the reliability or non-reliability of the underlying determination, but on the mere fact of the determination." Id. at 880 (citations omitted). We explicitly disapproved of two decisions in which the Court of Appeals reversed driving while suspended convictions based on inadequate suspension notices, saying, "While defects in the administrative process may warrant relief under administrative law, it is not the province of criminal proceedings to correct such errors." Id. (disapproving Griffin v. State, 654 N.E.2d 911 (Ind. Ct. App. 1995) and Pebley v. State, 686 N.E.2d 168 (Ind. Ct. App. 1997)).

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Hammond asserts that a recent legislative amendment adding the word "validly" to modify "suspended" in § 9-30-10-16[4] served to nullify the holding in Stewart. (Appellee's Br. at 8-9.) Although the former version of the statute was in effect at the time of Hammond's arrest and trial, Hammond contends that the amendment shows the legislature's intent that any notice deficiency in the underlying suspension automatically invalidates a conviction for operating while suspended. (Appellee's Br. at 8-10.) We disagree.

In Stewart, we discussed the required elements and mens rea for an HTV suspension and held that a license suspension is valid until and unless it is successfully challenged. See Stewart, 721 N.E.2d at 879-80. The addition of the word "validly" to the statute does not, therefore, change the holding of Stewart. If no challenge has occurred as of the date the driver is charged with driving while suspended, the suspension is valid at the critical time, and the subsequent conviction stands. Id.

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[4] This amendment, effective July 1, 2000, revised Ind. Code § 9-30-10-16 to read: "A person who operates a motor vehicle: (1) while the person's driving privileges are validly suspended . . . and the person

knows that the person's driving privileges are suspended . . . commits a Class D felony." (Additions underlined.)

Here, as in Stewart, the omission in Hammond's suspension notice does not entitle her to per se reversal of her suspension. It does afford her an equitable remedy: an extended time frame during which to challenge her suspension on the merits. We alluded to this relief in Stewart, saying, "[I]t is conceivable that failure to mail a notice might afford a driver certain tardy remedies in the administrative process or in court . . . ." Id. at 879. The

The validity of a license suspension depends on the merits of the adjudication, so an untimely or incomplete suspension notice does not justify automatic reversal of the suspension. The Marion Circuit Court thus erred when it vacated Hammond's suspension based solely on inadequate notice, and the post-conviction court erred when it determined that Hammond's guilty plea was unsupported. The proper remedy for the BMV's failure to explain Hammond's right of challenge is to allow Hammond the belated opportunity to challenge her HTV suspension on the merits. Were she successful at that, she might then petition for post-conviction relief in the court where she pled to the felony of continuing to drive.

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BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

DUNLAP v. STATE, No. 49S00-0002-CR-104, ___ N.E.2d ___ (Ind. Jan. 29, 2002).

DICKSON, J.

At trial Westbrook testified that she tried to turn the defendant around but was not sure whether she was holding on to or touching the defendant when the shots were fired. The defense then confronted her with excerpts from a transcription of her statement to the police when interviewed a year and a half earlier and cross-examined her regarding it. Westbrook acknowledged making the statement. The defense then read the following from the transcript and asked Westbrook if she remembered saying this to police:

> Q. Where was [defendant], where was [defendant] standing when you saw her with the gun?
> A. She was in the yard.
> Q. Okay, front yard?
> A. The front yard, so I try to run at there to make one like on the side where the gun when point to make-- make her turn her around slowly to go into the van and she shoots it, then.
> Q. Did she shoot before you got a hold of her?
> A. One, the first one was.

Record at 257. Westbrook replied: "I don't remember saying this." Id. Then directing Westbrook's attention to a later part of her statement, the defendant's trial counsel asked whether it would be "fair to say . . . that at least certainly the statements on page 15 where you told Detective Burks you grabbed her while [defendant] was shooting, [footnote omitted] that's different from what you're telling us today, right?" Id. Westbrook answered, "Yes, because I don't exactly remember it from the time I made this statement." Id. Shortly thereafter, the defense offered as an exhibit the entire 18-page typewritten transcript into evidence for the purpose of impeachment as a prior inconsistent statement. The State objected, arguing that it was not inconsistent, and the trial court refused to admit the exhibit. Record at 265. For the purposes of Rule 613(b), a statement at trial of "I am not sure" or "I don't remember" is not necessarily inconsistent with an earlier statement that provides the answer to the question being asked. We consider the differences between Westbrook's trial testimony and her statements in the transcribed police interview to be

within the ambit of the trial court's discretion to determine inconsistency. We decline to find that the trial court erred in sustaining the State's objection asserting that the prior statements were not inconsistent.

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SHEPARD, C. J., and BOEHM and RUCKER, JJ., concurred.
SULLIVAN, J. filed a separate written opinion in which he dissented.

PIERCE v. STATE, No. 49S00-0011-CR-710, ___ N.E.2d ___ (Ind. Jan. 29, 2002).
BOEHM, J.

Pierce finally contends that his multiple convictions violate the Indiana Double Jeopardy Clause. Ind. Const. art. I, § 14. Specifically, Pierce argues that he cannot be convicted of both burglary as a Class A felony and robbery as a Class B felony when both crimes are enhanced by the same bodily injury. [Footnote omitted.] The Indiana Double Jeopardy Clause prohibits multiple convictions if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999); accord Wise v. State, 719 N.E.2d 1192, 1201 (Ind. 1999).

To convict Pierce of burglary as a Class A felony, the State must show that: (1) Pierce broke and entered (2) the victim's house (3) with the intent to commit a felony therein (4) resulting in either bodily injury or serious bodily injury. Ind. Code § 35-43-2-1 (1998). To convict Pierce for robbery as a Class B felony, the State must show that Pierce: (1) knowingly or intentionally (2) took money (3) from the presence of the victim (4) by use of force or threat of force and (5) while armed with a deadly weapon or resulting in bodily injury to the victim. Id. 35-42-5-1.

Each of these crimes includes evidence or facts not essential to the other. The taking of money supports the robbery and the breaking and entering supports the burglary, but neither is an element of the other crime. Nevertheless, we have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson. See Richardson, 717 N.E.2d at 55 (Sullivan, J., concurring); id. at 57 (Boehm, J., concurring). Among these is the doctrine that where a burglary conviction is elevated to a Class A felony based on the same bodily injury that forms the basis of a Class B robbery conviction, the two cannot stand. Cf. Campbell v. State, 622 N.E.2d 495, 500 (Ind. 1993) (battery and burglary) [footnote omitted]; Wolfe v. State, 549 N.E.2d 1024, 1025 (Ind. 1990) (attempted rape and robbery); McDonald v. State, 542 N.E.2d 552, 555-56 (Ind. 1989) (two robberies). Accordingly, the robbery conviction is reduced to a C felony. [Footnote omitted.]

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SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

SPIVEY v. STATE, No. 41S00-0002-CR-76, ___ N.E.2d ___ (Ind. Jan. 29, 2001).
DICKSON, J.

The defendant's first contention is that his convictions and sentences for murder and conspiracy to commit burglary violate the Indiana Double Jeopardy Clause, Article 1, Section 14 of the Indiana Constitution, as explicated in Richardson v. State, 717 N.E.2d 32 (Ind. 1999). The defendant claims that under the actual evidence test he may not be properly convicted of felony murder and conspiracy to commit a felony when the two offenses share an element. In this case the underlying felony for felony murder was burglary, and the overt act in the conspiracy referred to elements of the same burglary. The defendant argues that, applying the Richardson actual evidence test, the Indiana Double Jeopardy Clause is violated because the jury used the evidence of breaking and

entering with intent to commit theft to prove common elements of both conspiracy to commit burglary and felony murder.

. . . To show that two challenged offenses constitute the same offense under the actual evidence test, "a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. at 53.

. . . The language expressing the actual evidence test explicitly requires evaluation of whether the evidentiary facts used to establish the essential elements of one offense may also have been used to establish *the essential elements* of a second challenged offense. The test is *not* merely whether the evidentiary facts used to establish *one* of the essential elements of one offense may also have been used to establish *one* of the essential elements of a second challenged offense. In other words, under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense. . . .

. . . The jury was instructed that to find the defendant guilty of the murder charge, the evidence must prove that the defendant or his accomplice killed Hughes while committing or attempting to commit burglary, which was defined as the breaking and entering of a building of another person with the intent to commit a felony therein. Record at 216-17 (Court's Final Instructions 10 & 11). As to the charge of conspiracy to commit burglary, the jury instructions permitted the jury to understand that the overt act element could be either the completed burglary or only the breaking and entering, but the killing of Hughes was not identified as a possible overt act. [Footnote omitted.] The evidentiary facts proving the essential elements of felony murder established that Hughes was killed in the course of the defendant's commission of burglary. Although these same facts thus established the essential elements of burglary, they did not also prove the agreement element of conspiracy. Similarly, the evidentiary facts used by the jury to establish that the defendant committed conspiracy to commit burglary, although including proof of breaking and entering and intent to commit a felony, did not also establish that Hughes was killed during the burglary. Thus, although the evidence proving each offense also proved some elements of a second offense, in neither case did the same evidentiary facts establish all of the essential elements of both offenses. In other words, the offenses of felony-murder and conspiracy were each established by the proof of a fact not used to establish the other offense. [Footnote omitted.] The defendant has thus failed to demonstrate a violation of the Indiana Double Jeopardy Clause under the Richardson actual evidence test.

As we hold today in Pierce v. State, No. 49S00-0011-CR-710, --- N.E.2d --- (Ind. 2001), this Court continues to recognize a series of rules of statutory construction and common law that are separate and in addition to the protections afforded by the Indiana Double Jeopardy Clause. However, the defendant's convictions for felony-murder and conspiracy to commit burglary do not qualify for relief under these rules.

Justice Sullivan has urged that an offender should not be punished for the crime of conspiracy where the overt act element of conspiracy "is the very same act as another crime for which the defendant has been convicted and punished." Richardson, 717 N.E.2d at 56 (Sullivan, J., concurring). He explains that this rule is required to assure that "the conspiracy is a separate and distinct act from the underlying crime." Id. Here, the conspiracy to commit burglary is sufficiently distinct from the offense of felony-murder. As an overt act of the conspiracy, the burglary was completed when the defendant entered the residence of John Hughes with the intent to commit theft. The defendant was not convicted and sentenced for burglary because the trial court merged the burglary count into the murder count. The defendant's crime of murder, however, required not only the burglary but also the death of Hughes, which is not part of the overt act for the conspiracy to commit

burglary. Thus the overt act was not the same as the crime of murder, and the offenses of conspiracy and murder are sufficiently distinct to permit the defendant to be separately convicted and punished for each.

We find no error under the Indiana Double Jeopardy Clause or under any rules of statutory construction and common law.

. . . .

SHEPARD, C. J., and BOEHM, J., concurred.

RUCKER, J., filed a separate written opinion in which he concurred in part, dissented in part, and in which SULLIVAN, J., concured:

I agree with the majority that Spivey's convictions for felony murder and conspiracy to commit burglary do not violate Indiana's Double Jeopardy Clause as articulated in Richardson v. State, 717 N.E.2d 32 (Ind. 1999). However, Indiana common law dictates that Spivey's conviction for conspiracy to commit burglary should be vacated.

In a unanimous opinion, we hold today that this Court has "long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson." Pierce v. State, __ N.E.2d __, No. 49S00-0011-CR-710 (Ind. Jan. 29, 2002). It is true there is case authority standing for the proposition that a defendant may be convicted of both conspiracy to commit a felony and the underlying felony. [Citations omitted.] However, consistent with today's holding in Pierce, this Court has not allowed to stand a conviction for conspiracy where the overt act that constitutes an element of the conspiracy is the same act as another crime for which the defendant has already been convicted. See, e.g., Morgan v. State, 675 N.E.2d 1067, 1072 (Ind. 1996) (agreeing that the defendant's convictions for both conspiracy to deal in cocaine and dealing in cocaine violated principles of double jeopardy because "the overt act in furtherance of the conspiracy could have been the same act as required to convict [the defendant] for dealing in cocaine."); Buie v. State, 633 N.E.2d 250, 261 (Ind. 1994)[1] (holding that where the overt act element of a conspiracy charge is the underlying offense, convictions on both the conspiracy and underlying offense cannot stand); Thompson v. State, 259 Ind. 587, 290 N.E.2d 724, 727 (1972) (holding "that before the court may enter judgment and impose sentence upon multiple counts, the facts giving rise to the various offenses must be independently supportable, separate and distinct.").

In this case Spivey was charged with burglary, felony murder—with burglary alleged as the underlying felony, and conspiracy to commit burglary. The evidence shows and the State concedes that the only overt act supporting the conspiracy charge was the burglary itself. Although the trial court entered no sentence on the burglary conviction, that was not sufficient in my view. Left standing was the conspiracy charge, the overt act for which Spivey has already been punished by reason of the felony murder conviction. If not under the Richardson double jeopardy test, [footnote omitted] then under this Court's traditional common law scheme, the convictions for both felony murder and conspiracy cannot stand. . . .

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[1] Although Buie was explicitly said to be superceded in Richardson, 717 N.E.2d at 49 n.36, only Justice Dickson and Chief Justice Shepard appear to have taken that view. Justice Sullivan concurred in Richardson but authored a separate opinion that cited Buie apparently with approval. Id. at 57 (Sullivan, J., concurring). The other two Justices did not comment on Buie but cited with approval other cases following additional common law doctrines.

HERNANDEZ v. STATE, No. 68S00-0009-CR-563, ___ N.E.2d ___ (Ind. Jan. 30, 2002).

BOEHM, J.

The third trial started on July 24, 2000. After four days of evidence, the jury began its deliberations at 2:30 p.m. on July 28. Shortly thereafter, the jury sent out a note requesting

to view a footprint and the evidence bearing on the time of death. After the court informed both parties of the note, the jury was brought back into the courtroom and, in the presence of the parties, the jury received the requested evidence. The jury returned to deliberations. There was no objection to this procedure.

At approximately 7:00 p.m., the jury sent a second note which asked, without punctuation: "What if we are a hung jury What will happen to Mr. Hernandez Will he go free or have another trial." The record is silent as to the court's response, if any, to this question. At 8:30 p.m., the jury found Hernandez guilty of murder.

A. *What Hernandez Does Not Claim*

[B]ecause Hernandez makes a novel claim, we think it useful to point out that Hernandez does not advance a number of similar contentions that are frequently presented to this Court. He quite properly does not argue that the court's inaction constituted an improper *ex parte* communication. Indeed, it was not a communication at all, if there was no response. Nor does he claim that the refusal to respond constituted an improper communication. This is also astute because if the response was a simple refusal to answer, that is harmless error to the extent it is an *ex parte* communication. [Citation omitted.]

Hernandez also makes no claim that it was an error of substantive law to refuse to respond. Once again, we agree with his judgment in selecting the issue to present on appeal. We think instructing a jury on the consequences of deadlock is similar to other inappropriate instructions. These include an instruction on the effect of deadlock in a sentencing hearing in a capital case under the Federal Death Penalty Act, [citation omitted] an instruction to consider that the defendant would receive credit for time served for his conviction, [citation omitted] an instruction on the possibility of parole, pardon, or "good time" sentence reduction, [citation omitted] or an instruction on potential sentences the defendant may be given if convicted, [citation omitted]. . . . Like sentencing, a description of the possible effect of a hung jury invites the opportunity for the jury to consider circumstances that have no bearing on the defendant's guilt or innocence.

Finally, Hernandez does not argue that Indiana statutes require a response. We agree that the trial court had no statutory duty to respond to the note. Whether or not the federal constitution requires the defendant's presence or the assistance of counsel in responding to jury inquiries, section 34-36-1-6 of the Indiana Code provides:

> If, after the jury retires for deliberation:
> (1) there is a disagreement among the jurors as to any part of the testimony; or
> (2) the jury desires to be informed as to any point of law arising in the case;
> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

Ind. Code § 34-36-1-6 (1998). Indiana case law has specified the procedure to follow in addressing a jury inquiry. The judge is to notify the parties of the jury request, inform the parties of the court's proposed response prior to communicating with the jury, and answer the request in open court with the parties present. [Citation omitted.] . . . Although the note requested that the court instruct on a point of law (the effect of a hung jury), for the reasons already discussed, it was not a request the court should have honored. Accordingly, the second note was not a request for a "point of law arising in the case," and section 34-36-1-6 does not apply.

B. *What Hernandez Does Contend*

Hernandez contends that the second note showed that the jury was deadlocked and that at least some jurors considered convicting Hernandez because he might go free if the jury could not return a verdict. Hernandez contends that this situation presented the potential for a motion for a mistrial based on a deadlocked jury or the opportunity for him to request curative instructions. He therefore argues that the point at which the jury sent the note was one which required counsel's judgment and advocacy, and was a "critical stage" of the proceeding such that the Sixth Amendment required presence of counsel.

Hernandez also argues that the error he identifies, by its very nature, cannot be harmless. He contends that the note implied that the jury could not agree and that some jurors, at least, were considering convicting Hernandez for reasons related only collaterally, if at all, to the evidence presented at trial. Hernandez contends that the State cannot show the error was harmless because the State cannot show that a mistrial would have been denied or that Hernandez could not have taken other curative measures if he had been given the opportunity to request them. . . .

. . . .

Several considerations bear on what constitutes a critical stage in a proceeding. The right to the assistance of counsel at a critical point in the trial encompasses "any stage of the prosecution where counsel's absence might derogate his right to a fair trial." [Citation omitted.] "Such a stage is a 'critical stage', and is any stage where (1) incrimination may occur or (2) where the opportunity for effective defense must be seized or be forgone." [Citation omitted.] More recently, this Court formulated the test for identifying a "critical stage" as "'whether the defendant is confronted with the intricacies of the law or the advocacy of the public prosecutor or prosecuting authorities.'" [Citation omitted.]

We agree that in this situation Hernandez may have been confronted with "intricacies of the law." The jury wanted to know what effect a hung jury would have on Hernandez. Although not involving specific evidence presented at trial or an interpretation of an instruction, the questions posed by the jurors nevertheless asked for guidance as to the effect of a hung jury. We agree with Hernandez that the note, if received, may have been a critical stage for Sixth Amendment purposes if it can be established that the trial court's response could influence the jury. However, as explained below, we are uncertain what occurred at this point in the trial. And even if we accept the version of the facts Hernandez proposes, it is not the end of the analysis. If we have a "critical stage," the burden of establishing the harmlessness of error falls on the State. [Citation omitted.] However, we think the burden of establishing that there is a critical stage in the first place falls on the defendant. [Citation omitted.] . . .

. . . .

On this record, we are unable to assess whether the second note triggered a "critical stage" because it is unclear whether there was any reasonable prospect that counsel might accomplish anything. As a result, we are unable to evaluate the degree of prejudice, if any, that would result from counsel's absence. It is not entirely clear to us that the trial court received the note, though both parties appear to assume or assert that it was received. If it was received, it is unclear whether the record of its handling is incomplete, or there simply was no response. If the latter is the case, we have no indication whether defense counsel was aware of the note or not or whether or not there was an opportunity to respond. In addition, Hernandez leaves us to speculate what curative measures he would have taken if he had been informed of the note. . . .

Similarly, Hernandez contends that he was precluded from moving for a mistrial, but does not make a persuasive claim that there is a realistic possibility that the motion would have been granted. . . .

The second note by the jury was not a statement to the judge that the jury was in deadlock. The jury's note did not approach a conclusion that there was "no probability" of a unanimous verdict. It asked what the consequences would be if it did deadlock. Even a statement that the jury cannot agree may result in further deliberation. [Citations omitted.] . . .

. . . .

Although our inability to resolve this issue is grounded on an absence of evidence, we do not believe the appropriate step is to order the trial court to supplement the record. The appellant has the burden of establishing the record necessary to his claim. . . . The claim that the note was received, that the defense was notified, and that there would have been a reasonable prospect of a mistrial or that the opportunity was lost to influence the court's response in any way that would affect the ultimate result is simply too speculative for appellate review at this stage.

In sum, Hernandez has failed to establish that the note triggered a "critical stage." . . . Although prejudice is presumed from the absence of counsel at a critical stage, we are sufficiently in the dark as to what happened in the trial court that we are unable to determine whether there was a critical stage or whether counsel was prejudiced. These issues are best resolved in a supplemental proceeding designed for fact finding.

. . . .

The judgment of the trial court is affirmed.

SHEPARD, C. J., and RUCKER, J., concurred.

DICKSON, J., concurs in affirming the judgment of the trial court, but dissents as to the need for supplemental proceeding, believing that the defendant does not have a valid Sixth Amendment claim.

SULLIVAN, J., filed a separate written opinion in which he dissented, in part, as follows:

The majority begins with an excellent analysis with which I largely agree of whether the receipt of the note constituted a "critical stage" of the proceeding requiring the assistance of counsel. . . . However, in the end the majority holds that the receipt of the note was not a critical stage because Hernandez does not identify any curative measures that he would have taken had he been informed of the note nor does he demonstrate any reasonable possibility that a mistrial or any other action would have resulted.

I think this analysis is incorrect. It is essentially requires Hernandez to demonstrate prejudice in order to establish the existence of a critical stage. But unlike a claim of ineffective assistance of counsel in which establishing prejudice is required to demonstrate Sixth Amendment error, prejudice is not required to be shown to establish the existence of a critical stage. Rather, the fact that a defendant has been deprived of counsel at a critical stage constitutes constitutional error and the burden then shifts to the State to prove, if it can, that the error was harmless beyond a reasonable doubt. [Citation omitted.] . . .

. . . .

LEDESMA v. STATE, No. 45A03-0107-CR-234, ___ N.E.2d ___ (Ind. Ct. App. Jan. 30, 2002).

VAIDIK, J.

Generally, to determine whether to instruct the jury on a lesser included offense of a charged crime, we have employed the three-step test outlined in *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995). Under *Wright*, first a trial court must determine if the alleged lesser included offense is inherently included in the charged offense. *Id*. at 566. If the court determines that it is not inherently included, the trial court proceeds to step two and decides whether the alleged lesser included offense is factually included in the crime charged. *Id*. at 567. Finally, if the alleged lesser included offense is either inherently or factually included, the trial court must look at the evidence of the case to see if there is a serious evidentiary dispute about the elements distinguishing the greater from the lesser offense. *Id*.

In *Wright,* our supreme court analyzed inherently included offenses by looking to Indiana Code § 35-41-1-16, specifically subsection (1) and the culpability prong of subsection (3). *Id*. at 566. Indiana Code § 35-41-1-16 provides that:

> "Included offense" means an offense that:
> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

Under the first step of *Wright*, which examines whether an alleged lesser included offense is an inherently included offense of the crime charged, our supreme court directed courts to determine:

> If (a) the alleged lesser included offense may be established 'by proof of the same material elements or less than all the material elements' defining the crime charged, Ind.Code § 35-41-1-16(1) (1993) . . . . or (b) the only feature distinguishing the alleged lesser included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser offense, Ind.Code § 35-41-1-16(3) (1993) . . . then the alleged lesser included offense is inherently included in the crime charged.

Thus, in defining inherently included our supreme court relied on all of subsection (1) and only part of subsection (3).[2]

While the *Wright* analysis of inherently included offenses focused on the majority of Indiana Code § 35-41-1-16, it did not need to examine subsection (2). The present case fits within subsection (2). Indiana Code § 35-41-1-16(2) defines an included offense as one that, "consists of an attempt to commit the offense charged or an offense otherwise included therein." Based on this definition, an attempt crime is an included offense of the completed crime. [Citation omitted.] Thus, by statutory definition attempted murder is an inherently included offense of murder.

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[2] In fact, regarding subsection (3) the supreme court noted in a footnote that:

> Indiana Code § 35-41-1-16(3) also defines a lesser included offense as one that "differs from the offense charged only in respect that a less serious harm or risk of harm to the same person, property or public interest . . . . " We leave for an appropriate case the decision whether a lesser included offense of this category should be treated as an inherently lesser included offense for the purpose of deciding whether to instruct a jury on lesser included offense . . . .

Wright, 658 N.E.2d at 566 n.2. This footnote indicates that the method for dealing with the portion of subsection (3) not relied upon under the *Wright* test is unsettled. Likewise, subsection (2) has not been examined before and is also unsettled.

BARNES and FRIEDLANDER, JJ., concurred.

CIVIL LAW ISSUE

HARRISON v. THOMAS, No. 89S05-0108-CV-379, ___ N.E.2d ___ (Ind. Jan. 29, 2002).
BOEHM, J.

II. The Condition Precedent

Although this case is controlled by the resolution of the issue discussed in Part I, we also address the effect of the condition precedent because we do not agree with the Court of Appeals' resolution of that issue. Paragraph 5 of the purchase agreement provided that the contract was "[s]ubject to Buyer obtaining and closing of vacant lot." In the trial court, the Thomases contended that this provision created a condition precedent that must be met before Harrison could seek enforcement of the agreement. Harrison argued that because he was Full House's 50% owner and Chief Operating Officer, the condition precedent was satisfied when Full House obtained title to the lot. He also contended that the condition in the contract was for his sole benefit and was waived even if not fulfilled.

. . . The Court of Appeals correctly noted that the purchaser of real property to whom the benefit of a contractual condition precedent inures may waive that condition and demand that the seller perform the contract. [Citations omitted.] In this case, the condition precedent that Harrison obtain title to the vacant lot was solely for Harrison's benefit. His development scheme hinged upon his ability to deliver title to both lots to the GSA, and it was a matter of complete indifference to the Thomases whether Harrison obtained the vacant lot, as long as he closed their sale. Accordingly, the condition precedent was waivable by Harrison. Although it recognized that Harrison could waive the condition, the Court of Appeals held that waiver of a condition precedent would have to be express and found no evidence Harrison had communicated to the Thomases "either orally or in writing, an express waiver of the vacant lot condition prior to the termination of the contract on July 30, 1998." Harrison, 744 N.E.2d at 983.

We think acquisition by Full House, Harrison's affiliate, was likely substantial compliance with the condition. But even if not, we think Christian's contacting the Thomases and stating Harrison was preparing to close is, in practical terms, a communication that the condition would be waived. To reach its conclusion that the waiver was not communicated, the Court of Appeals relied heavily upon Dvorak v. Christ, 692 N.E.2d 920, 924 (Ind. Ct. App. 1998), trans. denied, which held that where a purchaser had not communicated, either orally or in writing, an express waiver of a condition precedent before the expiration of the contract, the contract terminated and the seller was not required to close. In Dvorak, the condition precedent was that the purchaser obtain a first mortgage loan for $451,600, and the contract provided that it would terminate and the rights of both parties would dissolve if the purchaser did not satisfy the condition precedent by March 29, 1995. Id. The purchaser failed to obtain the financing, so the contract terminated by its own terms on March 30, 1995. Id. Only then did the purchaser attempt to waive the condition precedent. Id.

As already noted, the contract clearly contemplated the possibility of a closing after July 30. Here the agreement survived July 30 for a reasonable time and, if the September 11 conversation had not taken place after an unreasonable delay, a trier of fact could easily have found it to be a timely waiver. To the extent that the Court of Appeals read Dvorak to create a rigid requirement that every waiver of a condition precedent must be expressly made, either orally or in writing, we do not agree. It has long been the law in this state that "[t]he performance of a condition precedent may be waived in many ways." Johnson v. Bucklen, 9 Ind. App. 154, 157, 36 N.E. 176, 177 (1894). One such way is by the conduct of one of the parties to the contract. Penmanta Corp. v. Hollis, 520 N.E.2d 120, 122 (Ind. Ct. App. 1988), trans. denied.

In sum, whether there has been a waiver of a contract provision is ordinarily a question of fact. van de Leuv v. Methodist Hosp., 642 N.E.2d 531, 533 (Ind. Ct. App. 1994). We would think that obtaining control of the vacant lot through an affiliate was substantial compliance with the condition in this contract. We would also suppose that contacting the Thomases and telling them Harrison was prepared to close is evidence of waiver, but once

again we are confronted with a factual issue and no finding. For the reasons given in Part I, this fact issue is not controlling, and we need not remand for its resolution.

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SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

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